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No. 89-1012

In the Supreme Court of the United States

OCTOBER TERM, 1989

SAM A. FIORELLA AND SHADES RIDGE HOLDING COMPANY, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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12 pp

QUESTION PRESENTED

Whether federal tax liens securing a government tax claim that had been assessed and reduced to judgment were rendered unenforceable by an Alabama statute providing that a judgment cannot be revived after the lapse of 20 years.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-12a), including the additions made by the court in connection with its order denying rehearing (Pet. App. 1a-2a), is reported at 888 F.2d 725. The opinion of the district court (Pet. App. 26a-59a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 1989. A petition for rehearing was denied on September 29, 1989 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on December 21, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Fiorella engaged in the gambling business in the Birmingham, Alabama, area for at least 40 years (Pet. App. 28a). His gambling activities generated large amounts of unreported income, resulting in unpaid federal tax liabilities of more than $4 million, including penalties and interest (*id.* at 29a). Since the 1950's, Fiorella has frequently conducted financial transactions in cash; failed to keep records of account; failed to maintain bank accounts; and caused his property to be titled in the name of others, including petitioner Shades Ridge Holding Co. (*id.* at 29a-30a; see generally *id.* at 30a-53a).

Since 1964, the government has been engaged in litigation with petitioners to determine and collect Fiorella's tax liabilities. In 1964 and 1965, the government commenced two actions in the United States District Court for the District of Alabama seeking, *inter alia*, to reduce to judgment income and wagering tax assessments against Fiorella totalling more than $1 million (Pet. App. 13a-14a, 27a). Those actions were consolidated, and, on January 3, 1968, the district court entered judgment against Fiorella in the amount of $1,004,553 (*id.* at 27a).

The government commenced the instant proceeding against petitioners in 1986, seeking to foreclose upon its tax liens and judgment liens (including, *inter alia*, the assessments reduced to judgment in 1968) against all property titled to Shades Ridge, on the theory that it was the nominee or alter ego of Fiorella (Pet. App. 27a). After a trial, the district court entered extensive findings of fact and conclusions of law (*id.* at 26a-59a), finding that Shades Ridge was a nominee, instrumentality, and alter ego of Fiorella and therefore that Fiorella's tax liabilities could be collected from property titled to Shades Ridge. The district court subsequently entered a final judgment and decree of

foreclosure (*id.* at 17a-18a, 21a-25a). Petitioners filed a motion for relief from judgment on the ground that the liens were unenforceable because an Alabama statute provides that a judgment cannot be revived more than 20 years after it is entered, but the court denied the motion (*id.* at 19a-20a).[1]

2. The court of appeals affirmed (Pet. App. 3a-12a).[2] In response to petitioners' petition for rehearing, the court amended its opinion to discuss its affirmance of the district court's denial of petitioners' motion for relief from the judgment (*id.* at 1a-2a). The court explained (*id.* at 2a): "The district court did not err in denying Fiorella's motion. When an unpaid assessment is reduced to judgment, the tax lien is incorporated, but not merged, in the judgment. Since the tax lien survives the judgment, it can be enforced at any time."

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[1] While this case was pending in the district court, the government had commenced a separate action seeking to revive the judgment entered against Fiorella in 1968. The district court refused to revive the judgment, on the ground that Alabama Code § 6-9-190 (1975) provides that a judgment cannot be revived after the lapse of 20 years from its entry. See Pet. App. 13a. The court of appeals affirmed (869 F.2d 1425 (1989), *reprinted at* Pet. App. 13a-16a), holding that the Alabama statute "is not a statute of limitations and operates the same against the United States as it operates against private parties" (*id.* at 15a). In so ruling, the court of appeals expressly declined to consider whether the tax lien securing payment of the tax liabilities reduced to judgment in 1968 remained enforceable (*id.* at 16a).

[2] The government also sought to reduce to judgment additional assessments against Fiorella, totalling $590,539, which represented his unpaid federal income tax liabilities for 1969-1976 (Pet. App. 27a). The district court reduced those assessments to judgment and held that the government was entitled to collect that liability from property titled to Shades Ridge (*id.* at 27a, 53a-59a, 65a-67a). The court of appeals affirmed (*id.* at 7a-12a), and petitioners do not seek review of that aspect of the judgment below.

ARGUMENT

The courts below correctly rejected petitioners' argument that federal tax liens arising from Fiorella's tax liabilities were rendered unenforceable by Alabama Code § 6-9-190 (1975). Petitioners do not allege that the decision below conflicts with any decision of this Court or of another court of appeals; indeed, petitioners acknowledge that the question presented here is one of "first impression" that "has not previously been addressed in any reported decision" (Pet. 10). Accordingly, there is no reason for review by this Court.

It is well established that, while state law defines whether a taxpayer has a property right to which a lien may attach, federal law determines the tax consequences and priorities of federal tax liens. See, *e.g.*, *United States* v. *National Bank of Commerce*, 472 U.S. 713, 722-723 (1985); *Aquilino* v. *United States*, 363 U.S. 509, 513-514 (1960); *United States* v. *Acri*, 348 U.S. 211, 213-214 (1955). " '[O]nce it has been determined that state law creates sufficient interests in the [taxpayer] to satisfy the requirements of [the statute], state law is inoperative,' and the tax consequences thenceforth are dictated by federal law." *United States* v. *National Bank of Commerce*, 472 U.S. at 722 (brackets in original) (quoting *United States* v. *Bess*, 357 U.S. 51, 56-57 (1958)). Thus, as a general matter, state law limitations upon creditors do not affect the attachment of a federal tax lien or its enforcement. See also *United States* v. *Rodgers*, 461 U.S. 677, 701 (1983).

Section 6321 of the Internal Revenue Code[3] provides that a federal tax lien on the taxpayer's property arises upon the assessment of a federal tax liability. Section 6322 of the Code defines the duration of federal tax liens as follows:

> Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the

[3] Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended (the Code or I.R.C.).

> assessment is made and shall continue until the liability for the amount so assessed (or a judgment against the taxpayer arising out of such liability) is satisfied or becomes unenforceable by reason of lapse of time.

Section 6502(a) of the Code provides that a properly assessed tax may be collected by levy or by a proceeding in court "but only if the levy is made or the proceeding begun—(1) within 6 years after the assessment of the tax; * * *." Petitioners' contention is that the final clause of Section 6322 operates to extinguish the federal tax lien at the time that state law would make a judgment arising out the same tax liabilities expire. This contention is mistaken. This clause of Section 6322 was not intended to import the vagaries of state law into the federal statute fixing the period of tax liens; rather, it refers to the limitation of Section 6502(a) of the Code. If no collection action is commenced within six years of assessment, the tax liability becomes "unenforceable by reason of lapse of time," and the tax lien is extinguished by operation of Section 6322. But if collection proceedings are commenced within the six-year period, the final phrase of Section 6322 is not implicated and the lien, unless otherwise discharged, remains in effect until the tax liability is satisfied.

It is apparent from the history of Section 6322 that the "unenforceable by reason of lapse of time" phrase was not intended to limit the life of tax liens by reason of state law limitations on the enforceability of judgments. This language was contained in Section 6322 before the provision had any reference to judgments. The parenthetical clause was added to Section 6322 in 1966; prior to that time, the statute provided that a lien shall continue in effect "until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time" (see 26 U.S.C. 6322 (1964)). The latter phrase plainly referred to the six-year period contained in Section 6502(a) for collection of

liabilities, and its meaning did not change with the addition in 1966 of the parenthetical phrase referring to judgments arising out of tax liabilities.[4]

As petitioners acknowledge (Pet. 10), the courts have recognized in a variety of contexts that, where an assessment is reduced to judgment, the accompanying lien is not merged into the judgment, but retains an independent existence. See, *e.g.*, *United States* v. *Overman*, 424 F.2d 1142, 1147 (9th Cir. 1970); *United States* v. *Hodes*, 355 F.2d 746, 748-749 (2d Cir. 1966), cert. dismissed, 386 U.S. 901 (1967); *Moyer* v. *Mathas*, 332 F. Supp. 357, 359 (M.D. Fla. 1971), aff'd, 458 F.2d 431, 433-434 (5th Cir. 1972); *United States* v. *Ettelson*, 67 F. Supp. 257, 259 (E.D. Wis. 1946), aff'd in relevant part, 159 F.2d 193, 196 (7th Cir. 1947). Thus, regardless of whether the judgment is enforceable, the lien itself can be enforced by judicial foreclosure, pursuant to Section 7403(a) of the Code, until the tax liability is satisfied. The operation of Section 6322 is cogently explained by a leading commentator (W. Plumb, *Federal Tax Liens* 50-51 (3d ed. 1972) (footnotes omitted)): "The commencement

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[4] In its later consideration of these provisions, Congress has indicated its understanding that Section 6322 extinguishes liens where the tax liability has become uncollectible because of the operation of Section 6502, not where a state statute would make a judgment unenforceable. In 1988, Congress amended Section 6502 to provide that commencing collection action within six years extends the period during which the tax liability may be collected by levy, as well as by enforcing the lien. See Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, § 1015(u), 102 Stat. 3573. The Conference Report explained the purpose of this amendment as follows (2 H.R. Conf. Rep. No. 1104, 100th Cong., 2d Sess. 5-6 (1988)):

> [T]he Senate amendment conforms the statute of limitations rule for levies to that for liens so that if a timely proceeding in court for the collection of tax is commenced, the period during which the tax may be collected by levy shall not expire as long as the tax is collectible.

of the suit tolls the statutory period, and the obtaining of a judgment will keep the time for collection open indefinitely, and will correspondingly extend the life of the lien. The Government need not perfect the lien of the judgment as the tax lien itself (with its original priority status) is preserved and may still be enforced by levy or by judicial foreclosure * * * ." See also M. Saltzman, *IRS Practice and Procedure* ¶ 14.18, at 14-93 (1981) (general tax "lien has an unlimited duration so long as collection action is begun within the six-year statutory period of collection").[5] Thus, the decision below fully accords with the settled interpretation of Section 6322.

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[5] The unlimited duration of a general tax lien is to be contrasted with other special tax liens to which Congress expressly has given limited duration. See, *e.g.*, I.R.C. § 6324(a) (estate tax lien has duration of ten years from the date of decedent's death); I.R.C. § 6324(b) (gift tax lien has duration of ten years from the date gifts are made); see also I.R.C. §§ 6324A, 6324B. Courts called upon to apply the limitation on the special estate tax lien have noted that, by contrast, the general tax lien has unlimited duration. See *United States* v. *Potemken*, 841 F.2d 97, 100 (4th Cir. 1988); *United States* v. *Cleavenger*, 325 F. Supp. 871, 876 (N.D. Ind. 1971); see also *Detroit Bank* v. *United States*, 317 U.S. 329, 335 (1943).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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